Raine, J.

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IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: RAINE, J.
Monday,
10th March, 1975.

THE QUEEN v. MEDAFUMEYE URAINUMAI of WANKO

RULING

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GOROKA
RAINE, J.

This was a trial held on circuit, when I was under some pressure, and delivered an extemporary judgment on an objection being taken to evidence the Crown sought to lead. I promised Counsel that I would later circulate a written judgment, because it seemed to me that the problem that arose could arise again, and that some guidance might be helpful. The ratio of this judgment is the same as the extemporary one, and I have only added one case, which I have subsequently found, with more time, and better library facilities, namely R. v. Rice & Ors. (1).

In the trial the accused elected to give evidence on oath. The Crown Prosecutor sought to cross-examine him on matters contained in a record of interview not tendered in the Crown case-in-chief. As things turned out I never looked at the record of interview. I never read the depositions, and this was not a situation where I had to look at the record of interview in order to decide upon its admissibility.

At a late stage in the Crown case the learned Crown Prosecutor tendered the alleged record of interview by the police with the accused. Objection was taken to this. After a very short time, and after some quite tentative submissions had been made by defence counsel, and before he had had time to fully open his objections to the record of interview, the Crown Prosecutor withdrew the record of interview. As I understood it, the interview was not objected to on the basis of alleged police brutality, or on that sort of ground. From what I heard, I was a little

(1) (1963) 1 A.E.R. 832.

surprised that the Crown did not persist. However, there are often conventions between counsel that are not known to the judge, and the Crown had established, on a prima facie basis, a reasonably strong case. Thus, when the Crown case closed I was really in the dark as to whether the record of interview was withdrawn by the Crown Prosecutor because of its possible inadmissibility, or because he simply did not feel that he needed any more than he had already led in order to make out a strong prima facie case against the accused.

Winn, J. (as he then was) said in R. v. Rice & Ors. (supra) (2) at p. 839:-

> "At the trial, as distinct from the committal proceedings, none of those statements was tendered in evidence before the prosecution case was closed. There is a general principle of practice, the court thinks, though no rule of law, requiring that all evidentiary matter that the prosecution intend to rely on as probative of the guilt of an accused person, or of the guilt of any one of a number of co-accused persons, should be adduced before the close of the prosecution case if it be then available. Whether or not evidence subsequently for the first time available to the prosecution should be introduced at any later stage is a matter to be determined by the trial judge in his discretion, exercised, subject to certain limits imposed by authorities which need not for the present purpose be examined, in such a way and subject to such safeguards as seem to him best suited to achieve justice between the Crown and the defendants, and between the defendants."

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(2) (1963) 1 A.E.R. 832

With great respect, I think I might add to what fell from his Lordship, that the Crown is also entitled to lead, and should lead evidence tending to refute defences that the Crown believes, on reasonable grounds, might be raised. Otherwise, I would entirely agree with what his Lordship said.

In this case I am unable to say, not having looked at the record of interview, or at the evidence in the committal proceedings surrounding its admission in the lower court, whether or not the record of interview was admissible, inadmissible, or suspect. The impression I formed was that when faced with an objection the Crown Prosecutor chose to "give the record of interview away." My impression is that he felt that he had a strong prima facie case and was not inclined to prolong the trial with a voir dire. My further impression is that he regarded the record of interview as being prima facie admissible. However, faced with an objection, the objective situation is that the Crown withdrew the tender of the record of interview between the police and the accused. In these circumstances, I think it would be wrong for me to imagine that the record was grossly inadmissible but, on the other hand, I think I should take the view that there were some problems in having it admitted.

Before I discuss the cases I might set out the various situations that could arise. Firstly, there is the situation where the Crown, through inadvertence omitted to, or, deliberately, decided not to tender a record of interview. Secondly, there is the sort of case, as might be the case here, where the Crown was in doubt about the admissibility of a confession, although it was inculpatory, and deliberately decided not to tender it. Thirdly, there is the case where the Crown, whatever the situation, decided for "tactical" reasons, not to tender the document. Fourthly, there could be a case where the Crown was convinced that the document was admissible, but contained matter that was grossly prejudicial, particularly where co-accused were concerned, and did not tender the document.

This situation arose in R. v. Rice & Ors. (supra)(3).

(3) (1963) 1 A.E.R. 832

There the Crown Prosecutor behaved, as I read the report, with great propriety. He thought that the record of interview of one of the co-accused could have been prejudicial to all the others, and this to a serious extent. He discussed this with the various counsel appearing for the accused men, but reserved his right to raise the subject in cross-examination, were the accused called, and he did not put the record of interview into evidence in the Crown case-in-chief. It is not suggested that his motives were improper, in fact the report suggests that he only behaved as he did from the highest motives.

Well, these are the sorts of situations that can arise. It seems to me that the matter is a discretionary matter for the trial judge. I also think that there is a distinction between the situation that we have here, where there is no jury, and the situation in England or Australia, where there is a jury, particularly in the case where there are co-accused.

It is also not lost on me that there is a clear distinction between the situation in a civil trial and the situation in a criminal trial. In a civil trial the plaintiff cannot split his case, except by consent, or in the exercise of the trial judge's discretion.

In my opinion, except in very special circumstances, the Crown simply has to make up its mind, and decide whether it will or will not put in a record of interview or any other document that could possibly incriminate an accused person. The two cases that I am about to quote from do not, with great respect to the judges who gave reasons in the Court of Criminal Appeal in England, explain why the views that were expressed were expressed as they were. Possibly their Lordships thought that the matter was so obvious that no reasons were really needed. With great respect to them, I will try and supply a reason or two. Firstly, I can see difficulties where the record of interview contains both inculpatory and exculpatory matter. Defence counsel might find himself in a difficult position if the Crown Prosecutor only put the inculpatory matter to the accused. Obviously he would want to bring the exculpatory matter to

light. This would probably mean that he would be forced to consider the tender of the record of interview, and in this case it would lead to the odd result that the defence would be tendering a document it had initially objected to. I also think of counsel for an accused person where, for some reason, a record of interview has not been tendered. I think of counsel at the time that he comes to advise his client of his rights, namely, whether he should give evidence on oath, or make an unsworn statement, or remain silent. I feel that a barrister is seriously disadvantaged, if he cannot assure himself and his client that a document that has not been tendered in the Crown case will not be used against him in cross-examination, if his client goes into the box. I think that this is very well set out by Winn, J. in R. v. Rice & Ors. (supra) (4) at p. 839. My own feeling is that, except in very special circumstances, possibly where an accused goes right off the rails and says quite wicked or stupid things, that the trial judge should resist any effort by the Crown to cross-examine the accused on a record of interview not tendered by the Crown in the Crown's case-in-chief. If a conscientious and fair Crown Prosecutor harbours doubts about the confession or admissions made, then in my view he should resolve the question during the case-in-chief, either by calling evidence, and having the matter decided, or by opening the matter to the trial judge in the absence of the jury, where the facts were not really in issue. But he should take his stand at that stage.

The only two authorities I have found are R. v. Rice & Ors. (supra) (5) and R. v. Treacy (6). Neither of them are decisive in the particular case that I have to decide. In the case of R. v. Treacy (supra) (7) there was apparently no doubt that the statement the accused made to the police was inadmissible, and at pp. 95, 96 Humphreys, J. (a tremendously experienced judge in the criminal jurisdiction), said:-

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(4) (1963) 1 A.E.R. 832
(5) (1963) 1 A.E.R. 832
(6) (1944) 30 C.A.R. 93
(7) (1944) 30 C.A.R. 93

> "That statement either was admissible in evidence or it was not. Sir Charles Doughty was disposed to say, frank as he always is, and desirous of being perfectly fair, 'I agree; I do not think I could have put that statement in evidence against the appellant in the circumstances, seeing that he was in custody on a charge of murder'. The statement, therefore, must be taken to be inadmissible."

Humphreys, J. therefore took a stand, qua admissibility, that I really cannot take, because I have not got an admission from counsel in the same terms as made by Sir Charles Doughty, nor have I seen the record of interview. Thus, Treacy's case (supra) (8) is possibly distinguishable from the one that I have to consider. But I would continue, at p. 96, with the quotation by Humphreys, J., which, even if people disagree with me as to the result of my judgment, certainly sets out, in my opinion, the proper principles upon which the Crown should move:-

> "But Sir Charles took the view: 'When the appellant had given some evidence in the witness box with regard to his movements on that morning which, in my view, did not agree with the statements which he had made in those inadmissible written answers to questions, I was entitled to put them to him, and to put in evidence the document containing them'. We profoundly disagree. In our view, a statement made by a prisoner under arrest is either admissible or not admissible. If it is admissible, the proper course for the prosecution is to prove it, and if the statement is in writing to make it an exhibit, so that everybody knows what it is and everybody can inquire into it and act accordingly. If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross-examination."

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(8) (1944) 30 C.A.R. 93

With great respect to a great trial judge like Humphreys, J. I completely agree. I am not inhibited by the fact that the situation in R. v. Treacy (supra) (9) was slightly different to the situation here. I find that I get some support from R. v. Rice & Ors. (supra) (10). At p. 838 Winn, J. said:-

> "A clear distinction should be drawn between cases where there is a single accused and cases where two or more persons stand charged; in the former category, it would be rare indeed to find justification for so using a statement made by a single accused, albeit wholly voluntary, for the first time after he had given evidence-in-chief and was being cross-examined. Different considerations apply where there are more than one accused."

(The underlining is mine).

I appreciate, that being a trial involving co-accused, that what his Lordship said in the first few lines is probably "obiter", however, it is, in my respectful view, a correct statement of the law, subject to the reservations I made above, where wicked, wild or extravagant allegations are made by the accused.

In my opinion, the attempt by the Crown to cross-examine on the record of interview here should in the exercise of my discretion be rejected. As I said above, I think that there could be occasions where I might possibly allow such a cross-examination. I have discussed this. It would be unwise for me to lay down the principles which might cause me to adopt a different course that I now adopt. However, criminal trials are not academic exercises, and this judgment should not encourage anybody to imagine that I would disallow cross-examination on a previously untendered confession where an accused brought the matter on his own head by reckless lies or extravagant or stupid allegations.

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(9) (1944) 30 C.A.R. 93
(10) (1963) 1 A.E.R. 832

I accordingly reject the attempt by the Crown to use the record of interview to cross-examine the accused.

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